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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SOHIL KARIMY, Plaintiff, vs. ASSOCIATED GENERAL CONTRACTORS OF AMERICA – SAN DIEGO CHAPTER, INC., APPRENTICESHIP & TRAINING TRUST FUND, Defendants.	NO. 08-CV-00297-L-CAB PLAINTIFF SOHIL KARIMY'S OPPOSITION TO DEFENDANT ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC. APPRENTICESHIP & TRAINING TRUST FUND'S MOTION TO DISMISS WITH PREJUDICE Date: June 23, 2008 Time: 10:30 a.m. Ctrm: 14 (Fifth Floor)

Plaintiff, Sohil Karimy, OPPOSES the Motion to Dismiss with Prejudice of Defendant ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC. APPRENTICESHIP & TRAINING TRUST FUND. This Opposition is supported by the following Memorandum of Points and Authorities, the Declarations of Sohil Karimy and Alexander B. Cvitan, and all of the pleadings in this case.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff, Sohil Karimy, (hereafter "Plaintiff" or "Karimy") filed this action on February 14, 2008 against his former employer Associated General Contractors of America San Diego Chapter, Inc., Apprenticeship & Training Trust Fund (hereafter, "Defendant" or "AGC Trust") for violation of the Civil Rights Act, intentional employment discrimination, violation of the California Fair Employment and Housing Act, and wrongful discharge in violation of public policy. Plaintiff also alleged causes of action not related to his termination, including claims relating to Defendant's failure to pay overtime compensation, and failure to pay wages upon termination. Plaintiff alleges the above acts constitute unfair business practices in violation of California Business and Professions §17200 et seq.

Defendant responded to the complaint with this Motion to Dismiss, under Fed. R. Civ. P. 12(b)(1), "on the ground that Karimy and the Trust Fund contracted to resolve the disputes set forth in the present action through binding arbitration" and alternatively as a "non-enumerated" Rule 12(b) motion to dismiss "for failure to exhaust non-judicial remedies." The motion is based entirely on the assertion that a valid arbitration agreement requires Karimy to arbitrate all of the disputes alleged in the complaint.

First of all, there is no enforceable agreement to arbitrate. The AGC Trust never signed the agreement it attempts to use against Karimy, and no arbitration procedure was incorporated by reference. Even if there were an arbitration agreement, it would be unenforceable as unconscionable under California contract law. Finally, even if the arbitration agreement existed and was enforceable, it only covers the claims relating to termination, and the proper procedure would not be to dismiss, but to stay the action, pending arbitration.

II. FACTS

Plaintiff was employed by Defendant as a Coordinator from August 2003 through April 2006 and as a Director of Operations and Education from April 2006 through September 2007, when he was wrongfully terminated. [Declaration of Sohil Karmy ¶ 2 (hereafter, Karimy Dec.)]. Plaintiff's wrongful termination resulted from complaints he made to Defendant related to Defendant's fraudulent activities as well as from discrimination against Plaintiff as a result of his ancestry.

In November 2005, while Plaintiff was a Coordinator, he was presented with an "At-Will Employment and Arbitration Agreement" ("Employment Agreement"). [Karimy Dec. ¶ 3, Exhibit E, at 7]. At the end of a staff meeting, Karimy's supervisor, Pete Saucedo, gave all of the employees the "Employment and Arbitration Agreement," as they were exiting the staff meeting. [Karimy Dec. ¶ 3]. Saucedo told the employees that there was a new revision to an employment document and that the employees had to sign it and hand it back to him immediately. [Id.]. Mr. Karimy had less than ten seconds to sign the document and return it to Saucedo. [Id.]. In June 2006, Plaintiff was presented with an identical Employment Agreement, except that the June 2006 Employment Agreement acknowledged Plaintiff's new position as a Director of Operations and Education. [Karimy Dec. ¶ 4, Exhibit F, at 10]. Saucedo told Karimy that he had to sign the document again because Mr. Karimy's title had changed. [Karimy Dec. ¶ 4]. As in 2005, Karimy was provided with the Employment Agreement at the end of a staff meeting and was only provided a few seconds to sign and return it to Saucedo. [Id.].

Karimy was asked to sign these Employment Agreements in order to continue his employment with Defendant. [Karimy Dec. ¶ 5]. When Karimy was later given copies, they were not executed by the AGC Trust. [Id.].

Section 5 of the Employment Agreement provides, in relevant part, as follows:

> "Employee and the Trust Fund agree that in the event Employee's employment is terminated (either by the Trust Fund or the Employee) any dispute that may arise between them relating to such termination of employment (including, without limitation, any federal or state statute, Title VII of the Civil Rights Act of 1964, as amended, the California Fair Employment and Housing Act, any statute or provision relating to employment discrimination and/or employment rights, the federal or any state constitution and/or any public policy) will be determined by arbitration and not by a lawsuit or resort to court process . . . The arbitration of issues relating to the termination of Employee's employment will be submitted pursuant to the ***Trust Fund's employment arbitration rules and procedures which are in effect on the date of termination***. The employment arbitration rules and procedures are available from the Trust fund on request, and are incorporated by reference . . ." (emphasis added).

In its Motion to Dismiss, the AGC Trust fails to address any of the defects in the Agreements, or the circumstances surrounding Karimy signing them.

First, the employment arbitration Rules and Procedures were not attached to the Agreement. [Karimy Dec. ¶ 6]. Defendant never provided the arbitration rules and procedures to Plaintiff despite Karimy's repeated requests for them. [Id.]. In fact, Plaintiff never saw a copy of the referenced Rules and Procedures until after he was terminated, and not until his attorney obtained them. [Karimy Dec. ¶ 6; Declaration of Alexander B. Cvitan ¶¶ 2-5 (hereafter, Cvitan Dec.)].

Second, the arbitration Rules and Procedures referred to in the Employment Agreement and purportedly incorporated by reference were not fully in existence at the time Plaintiff signed the Employment Agreement. The Rules and Procedures finally obtained by Karimy's attorney on January 15, 2008 consisted of two parts, the

first is a document dated December 15, 1998, signed by AGC Trust representatives [Cvitan Dec. Exh. D, at 12]. This document, in the first paragraph, provides that the Defendant "Reserves the right to revise these arbitration rules and procedures in the future as it deems necessary." [Cvitan Dec. Exh. D, at 12]. This document also states that "any controversy concerning termination of employment shall be settled by arbitration administered by JAMS/Endispute under the JAMS/Endispute Arbitration Rules and Procedures for Employment Disputes, as may be amended or changed from time to time." [Cvitan Dec. Exh. D, at 12]. The JAMS Rules and Procedures in existence at the time of Karimy's termination became effective on March 26, 2007, almost ten months after Karimy signed the Employment Agreement. [Cvitan Dec. Exh. D at 13]. Thus, even if the AGC had given Karimy the Rules and Procedures when he signed the Employment Agreements, they would not have been the ones in effect at the time of Karimy's termination.

Third, without the Rules and Regulations, Karimy could not understand what arbitration entailed and the full ramifications of signing the agreement. [Karimy Dec. ¶ 7]. This is precisely the reason that he continuously requested the Rules and Procedures, but they were never given to him. [Id.]. During approximately the last four months of his employment with Defendant, Saucedo instructed Plaintiff to provide the Employment and Arbitration Agreement to new hires. [Karimy Dec. ¶ 8]. However, neither Saucedo, nor anyone else, ever instructed Plaintiff to explain the contents of these documents to any new hire, nor could he have since he did not fully understand the contents. [Id.] In any event, Karimy never gave the document to any new hire because no one new was hired during the last four months of his employment with Defendant. [Id.]

Fourth, Mr. Karimy was required to sign the agreements immediately in order to continue his employment with Defendant in 2005 and again in 2006. [Karimy Dec. ¶¶ 3-5]. Plaintiff was not told that he would read the Agreements before he signed them, nor was he given an opportunity to meaningfully review the

Agreements or the purportedly incorporated Rules and Procedures prior to signing the Agreements. [Karimy Dec. ¶¶ 5-6]. Plaintiff was not given an opportunity to opt-out of the arbitration provision. [Karimy Dec. ¶ 5]. As previously mentioned, even if he had been given such opportunity, this would not have made a difference, as the Rules and Procedures in effect when Plaintiff signed the Agreements were not the same Rules and Procedures at the time of his termination.

Fifth, the arbitration provision allows Defendant to unilaterally modify, alter, or change the rules and procedures as it wished. [Karimy Dec. Exh. E, at 7 and Exh. F, at 10, Section 5]. Between the date that the Employment Agreements were signed and the date that Plaintiff was terminated, Defendant could have modified, altered, or changed its arbitration rules and procedures to the detriment of Plaintiff, without Plaintiff's control, consent, or even Plaintiff's knowledge.

Finally, the arbitration provision only provides for the arbitration of claims likely to be brought by employees. For example, the only claims that are subject to arbitration are those claims relating to the termination of an employee, including claims for wrongful termination or violation of employment rights. [Karimy Dec. Exh. E, at 7 and Exh. F, at 10, Section 5]. The arbitration provision implicitly excludes all other claims, which are claims that the Defendant is more likely to bring, such as claims for injunctive or other equitable relief for intellectual property violations; and unfair competition arising from the use or unauthorized disclosure of trade secrets or confidential information. Indeed, the Defendant's attorney sent Karimy a demand letter on September 27, 2007, advising him that he was required to return Defendant's property and reminding him of purported obligations under the California Trade Secrets Act and a Confidentiality Agreement he had signed [Karimy Dec. Exh G, at 12]. According to the Employment Agreement, the AGC Trust would be free to file a lawsuit regarding these matters, rather than to arbitrate them.

III. ARGUMENT

A. THERE IS NO VALID ARBITRATION AGREEMENT

We do not dispute that the Federal Arbitration Act, 9 U.S.C. §§ 1-16, applies to enforce any valid arbitration agreement. However, it must first be determined whether there *is* a valid arbitration agreement.

> "It is a settled principle of law that 'arbitration is a matter of contract.' *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). Federal law 'directs courts to place arbitration agreements on equal footing with other contracts.' *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002). Arbitration agreements, accordingly, are subject to all defenses to enforcement that apply to contracts generally. See 9 U.S.C. § 2 (2002). To evaluate the validity of an arbitration agreement, federal courts 'should apply ordinary state-law principles that govern the formation of contracts.' *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1985)."

Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1170 (9th Cir. 2003). *See also*, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964) ("The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the ... agreement does in fact create such a duty"); *Cariaga v. Local No. 1184 Laborers Intern. Union of North America*, 154 F.3d 1072, 1074 (9th Cir. 1998) (existence of arbitration agreement in construction subcontract determined under California law). The

determination as to whether there is an arbitration agreement must therefore be decided under California law governing employment contracts in general.

1. Defendant Did Not Agree to the Arbitration Agreement it Is Attempting to Impose upon Karimy.

Defendant bases its motion here on the Employment Agreement signed by Karimy, allegedly incorporating arbitration rules in another document. However, the agreement Defendant seeks to enforce against Karimy, is not signed on Defendant's behalf. There is no evidence that Defendant ever signed this agreement. [Karimy Dec. ¶ 5; Exh. E, at 8 and F, at 11].

"It is a settled principle of law that 'arbitration is a matter of contract.'" *Ingle*, 328 F.3d 1165, 1170, *quoting from Warrior Gulf, supra*. Thus, there can be no contract formed if there is a lack of mutual assent. Even if a contract is formed, Defendant's failure to sign the Employment Agreement makes it unconscionable, as discussed more fully below.

2. No Arbitration Procedure Was Incorporated by Reference into the Agreement Karimy Signed.

The Agreement signed by Karimy (but not signed by Defendant) did not provide rules for arbitration. Instead, it referenced another document providing those rules:

> The arbitration of issues relating to the termination of Employee's employment will be submitted pursuant to the Trust Fund's employment arbitration rules and procedures which are in effect on the date of termination. The employment arbitration rules and procedures are

> available from the Trust Fund on request, and are incorporated by reference..." [Karimy Dec., Exhibits E and F, Section 5].

Whether or not the "Trust Fund's employment arbitration rules and procedures" are incorporated by reference, must be determined under California law. *See* Cariaga, 154 F.3d 1072, 1074 (whether subcontract incorporated arbitration provision of collective bargaining agreement determined under California law, not federal law).

> "Under California law, for one document to incorporate another document by reference, "[t]he reference to the incorporated document must be clear and unequivocal and the terms of the incorporated document must be known or easily available to the contracting parties." *Slaught v. Bencomo Roofing Co.*, 25 Cal.App.4th 744, 748, 30 Cal.Rptr.2d 618, 621 (1994) (citations omitted)." [Id.].

The reference to the incorporated document must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties. *Chan v. Drexel Burnham Lambert, Inc.* 178 Cal. App. 3d 632, 641, 223 Cal.Rptr. 838 (1986). For incorporation by reference to be effective, it is necessary that the incorporated document be clearly identified and in existence at the time of incorporation. *People v. Egan* 141 Cal.App.3d 798, 803 190 Cal.Rptr. 546 (1983), *citing* *Estate of McNamara* 119 Cal.App.2d 744, 747, 260 P.2d 182 (1953).

Here, the Rules and Procedures allegedly incorporated by reference were not known or easily available to Mr. Karimy. First, while the AGC Trust adopted the JAMS rules in 1998, the actual JAMS rules applicable to the termination were not in

existence at the time they were allegedly incorporated by reference. The actual Rules and Procedures in effect at the time Karimy was terminated only became effective on March 26, 2007. [Cvitan Dec. ¶ 5, Exh. D, at 13]. As such, these rules could not have been known to Karimy to be validly incorporated by reference.

In a similar situation, a California Court of Appeal recently found that arbitration procedures could not be incorporated by reference, where "the arbitration provisions were not readily available to the plaintiffs, in that the Warranty Booklet was not provided before or at the time the Builder's Application was presented for signature just before the close of escrow." *Baker v. Osborne Development Corp.*, 159 Cal.App.4th 884, 896, 71 Cal.Rptr.3d 854, 863 (4th Dist. 2008).

Most important is the fact that **the arbitration rules were never made available to Karimy, despite his repeated requests, and were only made available to his attorney after several requests**. [Karimy Dec. ¶ 6; Cvitan Dec. ¶¶ 3-4]. Karimy requested the Rules and Procedures on at least four occasions from his supervisor, Pete Saucedo, who told Karimy that Saucedo would obtain the rules from the attorney's office and give them to him. However, Saucedo never did. [Karimy Dec. ¶ 6].

Where "the agreement to arbitrate was not contained in an employment contract, where it might have been expected, but in a form" in a separate document, not easily available, it cannot be said to have been validly incorporated by reference. *Metters v. Ralphs Grocery Co.*, 161 Cal.App.4th 696, 703, 74 Cal.Rptr.3d 210, 215 (4th Dist. 2008).

Defendant is asking this Court to enforce arbitration procedures against Karimy, which it failed and refused to make available to him, through an agreement which it did not even sign itself. This is not only contrary to standard law of contract formation and interpretation, it is unconscionable. We now turn to that issue.

B. THE ARBITRATION AGREEMENT IS UNENFORCEABLE AS UNCONSCIONABLE

The doctrine of "unconscionability" is a general contract defense, which may be applied consistent with the FAA to defeat a contractual claim for arbitration. "Because unconscionability is a generally applicable defense to contracts, California courts may refuse to enforce an unconscionable arbitration agreement." *Ingle*, 328 F.3d 1165, 1170. The doctrine of unconscionability under California contract law has been summarized by the California Supreme Court thus:

> "To briefly recapitulate the principles of unconscionability, the doctrine has ' "both a 'procedural' and a 'substantive' element," the former focusing on " 'oppression' " or " 'surprise' " due to unequal bargaining power, the latter on " 'overly harsh' " 'or " 'one-sided' " results.' [Citation omitted.] The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, ' "which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." ' ... [¶] Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided." (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071, 130 Cal.Rptr.2d 892, 63 P.3d 979 (Little), *cert. den. sub nom. Auto Stiegler, Inc. v. Little* (2003) 540 U.S. 818, 124 S.Ct. 83, 157 L.Ed.2d 35.)"

Discover Bank v. Superior Court , 36 Cal.4th 148, 160, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005). There is thus a "sliding scale" between "procedural" and "substantive" unconscionability. The more substantively oppressive the contract term, the less

evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa. *See* *Armendariz v. Foundation Health Psychcare Services, Inc*. 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (2000). The Ninth Circuit has held that the principles of unconscionability under California law apply to contentions by employers that disputes under an employment agreement must be arbitrated. *Ingle*, 328 F.3d 1165, 1170.

1. Procedural Unconscionability

Procedural unconscionability focuses on the factors of surprise and oppression. "The oppression component arises from an inequality of bargaining power ... and an absence of real negotiation or a meaningful choice on the part of the weaker party." *Kinney v. United HealthCare Services, Inc.*, 70 Cal.App.4th 1322, 1329, 83 Cal.Rptr.2d 348 (1999). In *Kinney*, the Court indicated that procedural unconscionability is clearly present when an employer provides an agreement to its employees and the employees are required to acknowledge his or her consent to its terms, including an arbitration provision, as a condition of continued employment with the company. [Id.]. The Court indicated that in these circumstances, it is clear that the employee has no opportunity to negotiate regarding the terms of the agreement. [Id.]. citing *Engalla v. Permanente Medical Group, Inc*., (1997) 15 Cal.4th 951, 984-985; *Perdue v. Crocker National Bank*, (1985) 38 Cal.3d 913, 924-925.

An agreement is procedurally unconscionable where "The agreement is a prerequisite to employment, and job applicants are not permitted to modify the agreement's terms-they must take the contract or leave it." *Ingle*, 328 F.3d 1165, 1171. An arbitration clause in an employment agreement, presented as a take-it-or-leave-it proposition has been held to be unconscionable even where "there are no factors of adhesion such as surprise or concealment. . . . [and the employer] not only

gave ample notice of the program and its terms, but also made efforts to have employment lawyers and human-resource personnel available to answer questions. There is no evidence (although the case did not progress very far) of undue pressure put on employees." Davis v. O'Melveny & Myers, 485 F.3d 1066, 1073 (9th Cir. 2007), *cert. dismissed*, 128 S.Ct. 1117 (2008). In fact, procedural unconscionability is generally presumed by the courts in contracts between individual employees and their employer, because of "the inequality between employer and employee and the economic power that the former wields over the latter . . . ." Gentry v. Superior Court, 42 Cal.4th 443, 472, 64 Cal.Rptr.3d 773, 795 (2007).

Here, Karimy was presented in 2005 and in 2006 with the Employment Agreement in order to continue his employment with Defendant. [Karimy Dec. ¶ 5]. Karimy was not provided an opportunity to review the Agreement, or referenced Rules and Procedures prior to signing the agreement and was asked to sign immediately. [Id.]. Despite Karimy's numerous requests to obtain the Rules and Procedures, these were never provided to him. [Karimy Dec. ¶ 6]. As previously stated this would not have made a difference since the Rules and Procedures in existence at the time Karimy signed the agreement were not the ones in effect at the time of his termination.

Defendant seems to argue that Karimy must be bound to the arbitration provisions he was never provided, because of the high level of his position with Defendant, and the fact that he was required himself to present the same Employment Agreement to other employees.[1/] However, "The suggestion that a contract or clause cannot be unconscionable if it is accepted by a knowledgeable party has been repudiated by our Supreme Court." Stirlen v. Supercuts, Inc., 51 Cal.App.4th 1519, 1534, 60 Cal.Rptr.2d 138, 147 (Cal.App. 1 Dist.,1997), *citing*,

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1/ Actually, this requirement was not imposed on him until just before his termination, and he never had the occasion to give the Employment Agreement to any other person. [Karimy Dec. ¶ 8].

Graham v. Scissor-Tail, Inc., 28 Cal.3d 807, 171 Cal.Rptr. 604, 623 P.2d 165 (1981).

Procedural unconscionability has also been noted where arbitration provisions incorporate separate rules and procedures and the employee is not provided a copy of the rules in advance, because the employee is forced to go to another source to learn the full ramifications of the arbitration agreement. *See Fitz v. NCR Corp*. 118 Cal.App.4th 702, 721, 13 Cal.Rptr.3d 88 (2004) (noting but not resolving issue); *Harper v. Ultimo*, 113 Cal.App.4th 1402, 1405, 7 Cal.Rptr.3d 418 (4th Dist. 2003) (procedural unconscionability found where contracts referred to arbitration rules which were not attached).

There can be no question that the agreement Defendant is attempting to enforce here is procedurally unconscionable. Where, as here, the Employment Agreement is presented to Karimy on an adhere- or-reject basis, the Court should conclude that the agreement is procedurally unconscionable. See *Ingle*, 328 F.3d 1165, 1172.

2. Substantive Unconsionability

"Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided." *Discover Bank*, 36 Cal.4th 148, 160.

> "[U]nder California law, a contract to arbitrate between an employer and an employee, such as the one we evaluate in this case, raises a rebuttable presumption of substantive unconscionability. Unless the employer can demonstrate that the effect of a contract to arbitrate is bilateral-as is required under California law-with respect to a particular employee, courts should presume such contracts substantively unconscionable." *Ingle*, 328 F.3d 1165, 1174.

Defendant here can not demonstrate that the contract is bilateral. First of all, it didn't even sign the Employment Agreement itself, so that the entire "agreement" is one-sided. It is doubtful whether the arbitration agreement could be enforced at all against Defendant in these circumstances. Even if the agreement could be enforced against it, the terms are one-sided on their face.

An arbitration agreement is substantively unconscionable where it compels arbitration of claims employees are most likely to bring against the employer (e.g., contract claims, tort claims, discrimination claims, etc.), and exempts from arbitration claims the employer is most likely to bring against its employees (e.g., injunctive or other equitable relief for intellectual property violations, unfair competition and the use or unauthorized disclosure of trade secrets or confidential information). *Mercuro v. Sup.Ct. (Countrywide Secur. Corp.)* 96 Cal.App.4th 167, 175–176, 116 Cal.Rptr.2d 671 (2002).

Here, the only claims subject to arbitration are those "relating to such termination of employment (including, without limitation, any federal or state statute, Title VII of the Civil Rights Act of 1964, as amended, the California Fair Employment and Housing Act, any statute or provision relating to employment discrimination and/or employment rights, the federal or any state constitution and/or any public policy)." [Karimy Dec. Exh. E and F, Section 5]. By their nature, these are claims that can only be brought by employees against employers. We cannot imagine any claims of Defendant which would be arbitrable under this agreement.[2/]

The Ninth Circuit (applying California law) has held that a provision giving the employer the unilateral right to terminate or modify the arbitration agreement also renders it substantively unconscionable. *Ingle*, 328 F3d 1165, 1179 (unilateral

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2/ For example, Karimy also agreed to certain confidentiality provisions. [Karimy Dec. ¶ 9]. Violation of those provisions could lead to claims by Defendant against Karimy. However, those claims are *not* subject to arbitration.

right of employer, not employee, to alter or terminate agreement makes it substantively unconscionable). Other courts are in accord. *See* Dumais v. American Golf Corp. 299 F3d 1216, 1219 (10th Cir. 2002); Floss v. Ryan's Family Steak Houses, Inc. 211 F3d 306, 315–316 (6th Cir. 2000); Hooters of America, Inc. v. Phillips 173 F3d 933, 939 (4th Cir. 1999).

Here, the arbitration provision allows for Defendant to unilaterally modify, alter, or change the rules and procedures as it wished. [Karimy Dec. Exh. E and F, Section 5]. The arbitration provision itself indicates that the arbitration of issues relating to the termination of Employee's employment will be submitted pursuant to the ***Defendant's employment arbitration rules and procedures which are in effect on the date of termination***. Those rules are adopted at the discretion of the Trustees of the Defendant. [Karimy Dec. Exh. E and F, Section 5]. Between the date that the agreements were signed and the date that Plaintiff was terminated, Defendant could have modified, altered, or changed its arbitration rules and procedures to the detriment of Plaintiff, without Plaintiff's control, consent, or even Plaintiff's knowledge. In fact the Trustees did so: the arbitration rules applicable here were issued *after* the Employment Agreement was signed. [Cvitan Dec. ¶ 5, Exh. D, at 13].

The arbitration provisions Defendant seeks to enforce here, if they exist at all, are procedurally and substantively unconscionable, and cannot be enforced.

C. IF THE ARBITRATION AGREEMENT WERE ENFORCEABLE, THE PROPER REMEDY WOULD NOT BE TO DISMISS THE ACTION, BUT TO REFER THE ARBITRABLE DISPUTES, AND STAY THE REMAINING CLAIMS TO ARBITRATION

1. Only Some of the Claims Are Arbitrable.

Plaintiff maintains that none of the claims brought by him should be subject to arbitration because the arbitration provision is invalid and unenforceable. However, should this Court find the arbitration provision enforceable, Plaintiff should not be ordered to arbitrate his third, fifth, sixth, and eighth claims for relief, as these claims are not related to Plaintiff's termination. "[A] party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, ..." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995).

Plaintiff's third and fifth claim for relief are brought under the Fair Labor Standards Act and California Labor Code §510, respectively, and relate to Defendant's failure to pay overtime. Plaintiff contends that he worked over 8 hours in a day and/or over 40 hours in a week and was not compensated at all for the overtime hours worked. Because these claims are unrelated to Plaintiff's termination, even if the arbitration provision was deemed enforceable, these claims are not arbitrable, under the plain terms of the agreement Defendant invokes here.

Plaintiff's sixth claim for relief, brought under California Labor Code §203, arises out of Defendant's failure to pay wages upon termination, including overtime wages and unpaid vacation, due and owing. Thus, this is also a wage and hour claim.

Plaintiff's eighth claim for relief is for unfair business practices and is brought under Business and Professions Code §17200 et seq. This claim arises under the same facts that the third claim for relief and therefore, is unrelated to Plaintiff's termination.

As discussed, Plaintiff's position is that the arbitration provision is unenforceable and that all of the claims must be litigated. However, if this Court finds that the arbitration provision is enforceable, then because Plaintiff's wage and hour claims do not fall within the claims that must be arbitrated under the arbitration provision, this Court should proceed with the nonarbitrable claims or should stay

litigation of all claims pending the outcome of the arbitration.

2. The Proper Procedure on Finding Arbitrability Is to Refer Those Claims to Arbitration and Stay the Action, Not to Dismiss the Entire Action.

A party to a lawsuit pending in either state or federal court may seek a stay of the action pending arbitration of one or more issues raised in such litigation. 9 USC § 3; see *Wagner v. Stratton Oakmont, Inc.* 83 F3d 1046, 1048 (9th Cir. 1996); *Subway Equip. Leasing Corp. v. Forte* 169 F3d 324, 329 (5th Cir. 1999). Where the action sought to be stayed involves both arbitrable and nonarbitrable disputes, the district court has discretion either to proceed with the nonarbitrable claims or to stay litigation of all claims pending the outcome of the arbitration. *United States v. Neumann Caribbean Int'l, Ltd.* 750 F2d 1422, 1426 (9th Cir. 1985). In a case in which fewer than all of the claims against a given defendant are subject to an arbitration agreement, or in which part of the relief sought is beyond the arbitrator's power to grant, it makes sense to require the party seeking to enforce the arbitration agreement to stay the litigation while compelling arbitration. In such cases, this procedure preserves a forum for the plaintiff's non-arbitrable claims, while at the same time preventing the defendant from abusing the arbitration agreement to create undue delay. *24 Hour Fitness, Inc. v. Superior Court*, 66 Cal.App.4th 1199, 78 Cal.Rptr.2d 533 (1st Dist. 1998).

Even if all of the claims were arbitrable, which they are not, this action should be stayed so the Court could monitor the arbitration, including any arguments that Defendant may advance to the arbitrator that he or she should not hear the claims.

IV. CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that the Court

IV. CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant's Motion to Dismiss with Prejudice. Plaintiff further requests that if this Court find the arbitration provision in question enforceable, that this Court proceed with the non-arbitrable claims or stay the litigation of all claims pending the outcome of the arbitration.

Respectfully Submitted,

Dated: June 9, 2008

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